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No. 88-1503

Supreme Court, U.S.
FILED
MAY 5 1989
JOSEPH F. SPANIOL, JR.
CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1988

NANCY BETH CRUZAN, by her parents and co-guardians, LESTER L. and JOYCE CRUZAN,
Petitioners,

vs.

DIRECTOR OF MISSOURI DEPARTMENT OF HEALTH, and ADMINISTRATOR OF THE MISSOURI REHABILITATION CENTER AT MT. VERNON,
Respondents,

vs.

THAD C. McCANSE, Guardian ad litem,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF MISSOURI

RESPONDENT GUARDIAN AD LITEM'S BRIEF IN RESPONSE TO PETITION FOR CERTIORARI

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QUESTION PRESENTED

Whether an incompetent person whose life is being maintained by medically supplied artificial means has rights of privacy, liberty, and equal protection of law under the United States Constitution and its Amendments to refuse further treatment, which rights are superior to a state's interest in preservation of life, and, if so, whether the incompetent's said rights may be exercised by a third person.

TABLE OF CONTENTS

QUESTION PRESENTED I
TABLE OF CONTENTS II
TABLE OF AUTHORITIES III
STATEMENT OF CASE 1
REASONS WHY THE PETITION FOR WRIT OF CERTIORARI SHOULD BE GRANTED 2

I. The Decision Below Denies Nancy Cruzan's Constitutional Rights of Liberty, Privacy and Equal Protection of Law and Is Contrary to Holdings by Other States' Supreme Courts 2

II. This Case Involves a Question of General Interest and Importance Which Should Be Settled by This Court 4

CONCLUSION 6

TABLE OF AUTHORITIES

Cases

Brophy v. New England Sinai Hospital, Inc., 497 N.E. 2d 626 (Mass. 1986) 3
In re Conroy, 98 N.J. 321, 486 A.2d 1209 (N.J. 1985) 3
In re Farrell, 529 A.2d 404 (N.J. 1987) 4
Gray v. Romeo, 697 F.Supp. 580 (D. R.I. 1988) 5
Griswold v. Connecticut, 381 U.S. 479 (1965) 2
In re Jobes, 529 A.2d 434 (1987) 4
In re Quinlan, 355 A.2d 647 (N.J.), cert. den., 429 U.S. 922 (1976) 3-4
Rasmussen v. Fleming, 741 P.2d 674 (Ariz. Banc 1987) 3
Roe v. Wade, 410 U.S. 113 (1973) 2
Superintendent of Belchertown State School v. Saikewicz, 373 Mass. 728 (1977) 3

STATEMENT OF CASE

Respondent Guardian ad litem adopts the Statement of the Case set forth in the Petition for Writ of Certiorari, pp. 5-10, with the following additions:

Thad C. McCanse was appointed Guardian ad litem and attorney for Nancy Beth Cruzan by the Probate Division of the Circuit Court of Jasper County, Missouri. Petitioners' App. p. A96. The Guardian ad litem filed an Appeal to the Missouri Supreme Court because, although he agreed that the tube feeding should be discontinued, he had the responsibility as attorney and Guardian ad litem to pursue this case of first impression to the highest court of the State in order to protect her interests fully. Petitioners' App. p. A6, footnote 1, pp. A63-A64.

A majority of the Missouri Supreme Court stated that the single issue was whether a Guardian could order that all nutrition and hydration be withheld from an incompetent ward who is in a persistent vegetative state, but who is neither dead nor terminally ill. Petitioners' App. p. A6.

The majority holding was that the guardian could not order the withholding of nutrition and hydration for five reasons: (1) the ward had made no formal expression of her wishes in this regard; Petitioners' App. pp. A34, A41-A42; (2) even if the incompetent had a constitutional right to refuse treatment it could not be exercised by a third party absent the most rigid of formalities, Petitioners' App. p. A40; (3) continuation of tube feeding and hydration was not a burden to Nancy and, therefore, must continue, Petitioners' App. pp. A36-A37, A43; (4) the state's interest is in preservation of life, not the quality of life, Petitioners' App. pp. A9,

A26, A34; and (5) a decision to allow discontinuance of tube feeding and hydration for Nancy Cruzan must involve a concern for other incompetents whose wishes are unknowable but who would, if able, choose to live. Petitioners' App. pp. A26, A45.

REASONS WHY THE PETITION FOR WRIT OF CERTIORARI SHOULD BE GRANTED

I

The Decision Below Denies Nancy Cruzan's Constitutional Rights of Liberty, Privacy and Equal Protection of Law and Is Contrary to Holdings by Other States' Supreme Courts

Griswold v. Connecticut, 381 U.S. 479 (1965), and *Roe v. Wade*, 410 U.S. 113 (1973), established clearly a constitutional right of privacy concerning traditional personal issues. Those decisions limited the State's powers in connection with an individual's exercise of those personal matters. In *Cruzan* the Missouri Supreme Court limited a person's rights to control the invasion of her body, an action entirely inconsistent with *Griswold* and *Roe*.

Nancy Beth Cruzan is being held a prisoner of unwanted medical technology. Based on his investigation and facts established at trial, the Guardian ad litem's position is that Nancy Beth Cruzan has a federal constitutional right to refuse any form of continued medical treatment to prolong an existence which is both mindless and physically totally disabling. Also, the Guardian ad litem believes that she did not lose that right when

she became incompetent without having made a formal expression of her wishes.[1]

The Missouri Supreme Court held that the right to refuse medical treatment must be shown by formalities such as under the Living Will Act, or by clear and convincing inherently reliable evidence. Petitioners' App. p. A41. The Court ignored the trial court's finding that there was other evidence, including her life style, that should be considered. Petitioners' App. pp. A60, A66. The Missouri Supreme Court's holding is tantamount to a requirement that a formal expression of intent to refuse medical treatment must be made, something that virtually all young people and most older people have not done and will not do.

Other state courts which have considered this question have held that the fundamental federal right to refuse medical treatment is not lost because of incompetency. *Rasmussen v. Fleming*, 741 P.2d 674 (Ariz. Banc 1987); *Brophy v. New England Sinai Hospital, Inc.*, 497 N.E.2d 626 (Mass. 1986); *Superintendent of Belchertown State School v. Saikewicz*, 373 Mass. 728 (1977); *In re Conroy*, 98 N.J. 321, 486 A.2d 1209 (N.J. 1985); *In re Quinlan*, 355 A.2d 647 (N.J.), cert. den., 429 U.S.

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1. Although the Guardian ad litem is listed as a respondent in this case, he supports the Petition for Writ of Certiorari. The role of the Guardian ad litem is discussed at length in *Rasmussen v. Fleming*, 741 P.2d 674 (Ariz. Banc 1987). His function is to represent the interests of the ward. He is not necessarily a guardian's adversary. He acts as a fact finder relevant to the medical care and prognosis of the incompetent and guardian's motives in seeking relief. The role of a Guardian ad litem does not at times fit neatly into the adversary structure of our legal system. In this case, it has resulted in the Guardian ad litem's apparently inconsistent position of appealing a trial verdict that he thought was correct, and now appearing in favor of a petition for certiorari even though he is a respondent in the pleadings.

922 (1976); *In re Jobes,* 529 A.2d 434 (1987). The Missouri Supreme Court's decision that the incompetent loses constitutional rights by reason of the incompetency is contrary to these authorities. This relegates the incompetent to an inferior status of second-class citizenship no matter how compelling the evidence would be that the incompetent would have supported a nonformal decision to refuse treatment. It denies his federal constitutional rights to privacy, liberty, due process and equal protection of law.

II

This Case Involves a Question of General Interest and Importance Which Should Be Settled by This Court

As medical science advances, it is certain that more equipment will be developed to keep the body machinery going even in the absence of a brain with a capacity to think or react to the environment or to people around it. This is a dilemma which will not go away, and which the legislatures in various states have been unable or unwilling to resolve. Petitioners' App. p. A72; *In re Farrell,* 529 A.2d 404 (N.J. 1987).

As pointed out in Petitioners' Brief, the highest courts in four states are in direct conflict on the question of a constitutional right to withdraw artificially supplied nutrition and hydration, that is, Arizona and Massachusetts, which would allow the withdrawal and Missouri and Washington, which would not. Petitioners' Brief, p. 10.

The United States Supreme Court has not expressly extended the constitutional right of privacy to permit a patient to direct the withdrawal of food and water, Petitioners' App. p. A26, or any other form of life-sustaining medical treatment. *Gray v. Romeo,* 697 F.Supp. 580 (D. R.I. 1988).

The general interest and importance of this problem was recognized by the Supreme Court of Missouri when it stated that it was deciding the case for all those incompetents whose wishes are unknowable. Petitioners' App. pp. A26, A45. But the wishes of that large class of persons will never be known if the test established in *Cruzan* prevails.

The Guardian ad litem believes, based on his investigation and the clear and convincing testimony of many witnesses at trial about Nancy Cruzan, who she was, what she said and how she lived, that she would not want the medical treatment the Missouri Supreme Court has forced on her. This decision has worked a grave injustice on Nancy Cruzan and all others similarly situated in Missouri. Regardless of the specific federal constitutional basis, it is clear that a federal right has been seriously compromised. This case is ripe for Supreme Court resolution. The decision below is wrong, there is a clear and divisive split among state supreme courts and there is a problem of national importance—do our incompetent persons have constitutional rights? Right now the answer depends on where they live.

CONCLUSION

For the foregoing reasons, Respondent Guardian ad litem supports the Petition for a Writ of Certiorari to the Missouri Supreme Court.

Respectfully submitted,

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